No. 83-1756

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAY M. VARGAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner could resist compliance with a subpoena duces tecum for the records of a professional corporation on Fifth Amendment grounds.

2. Whether the factual predicate for the "crime or fraud" exception to the attorney-client and work-product privileges was properly established in this case.

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OPINION BELOW

The opinions of the court of appeals (Pet. App. 1-26) are reported at 723 F.2d 1461 and 727 F.2d 941.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1984. The panel granted rehearing and affirmed its previous judgment on March 14, 1983. The petition for a writ of certiorari was filed on April 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1983, petitioner, an attorney whose practice is organized as a professional corporation (see Pet. 4), was subpoenaed by a grand jury in the District of New Mexico to produce his billings to two nonprofit corporate clients, the Sangre de Cristo Community Mental Health Service,

Inc. and Northern Community Preservation, Inc. Petitioner complied with that request. On March 29, 1983, petitioner was served with a second subpoena duces tecum directing him to produce his client files for the two nonprofit corporations reflecting the services provided by petitioner beginning August 1, 1981.[1] Pet. App. 15.

On April 18, 1983, one day before petitioner was to appear before the grand jury, he filed a motion to quash the subpoena, asserting the attorney-client and work-product privileges.[2] Thereafter, Sangre de Cristo moved to intervene and join the motion to quash. In support of the subpoena, the government alleged that petitioner and the two nonprofit corporations were involved in a joint scheme to use public grant funds for private gain. Petitioner allegedly benefited from the scheme by billing the clients for legal services he did not perform. The district court denied the motion to quash, instructing petitioner to appear before the grand jury with his records on June 1. The court stated that if petitioner still claimed a privilege at that time, the clerk of the court would seal the records and the judge would review them in camera. Pet. App. 2, 15-16.

On June 1, petitioner appeared before the grand jury. He invoked his privilege against self-incrimination with respect to the records, and he refused to provide any testimony other than his name. After a hearing, the district court found the attorney-client, work-product, and Fifth Amendment privileges inapplicable and ordered petitioner to

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[1]The court of appeals' opinion mistakenly gives the date as August 1, 1983 (Pet. App. 15).

[2]In connection with the motion, petitioner's attorney filed an affidavit indicating that the client files contained 674 separate documents consisting mostly of copies of articles and cases and tangible materials obtained from the clients or others (Affidavit of R. Raymond Twohig, Jr., dated April 28, 1983).

produce the records on June 7. The court stated that if petitioner failed to do so he would be held in contempt. Pet. App. 16.

2. Thereafter, Sangre de Cristo filed an appeal from the district court's order and obtained a stay of the order from the court of appeals. Because the stay became effective before petitioner was required to produce the records, he was not held in contempt. Petitioner then filed a petition for a writ of mandamus and/or prohibition directing that the order be vacated pending final disposition of Sangre de Cristo's appeal. Pet. App. 16.

The court of appeals dismissed Sangre de Cristo's appeal on the ground that the denial of a motion to quash is an unappealable interlocutory order (Pet. App. 17-23). The court also denied petitioner's petition for a writ of mandamus and/or prohibition, finding no usurpation of power or clear abuse of discretion by the district court with regard to any of the claimed privileges (*id.* at 24). In particular, the court reaffirmed the general principle that the attorney-client and work-product privileges do not apply where the client consults an attorney to further a crime or fraud, and it held that the applicability of the "crime or fraud" exception may be established by an ex parte prima facie showing based on documentary evidence or on good faith statements by the prosecutor as to evidence received by the grand jury (*id.* at 24-25). After reviewing the record, the court observed that the government might have presented sufficient prima facie evidence to the district court to support a finding that petitioner and Sangre de Cristo were joint participants in crime, but the court of appeals did not reach that issue because the district court had not expressly made such a determination (*id.* at 25).

In addition, the court rejected petitioner's argument that the district court abused its discretion in not ordering an in

camera inspection of the records in order to determine if there was a possibility that some were outside the scope of the "crime or fraud" exception (Pet. App. 25). The court concluded that "the scope of the exception to the attorney-client privilege in the case at bar would be sufficiently broad to cover all of the documents requested if the trial court determines that the government has made a prima facie showing" (*ibid.*).[3]

Finally, the court rejected petitioner's assertion of the Fifth Amendment privilege, finding that petitioner "presented no grounds for invoking [the court's] mandamus jurisdiction with regard to the Fifth Amendment claim" (Pet. App. 26).

3. Five days after entry of the court of appeals' decision, the grand jury subpoenaed the same client files that were requested in the March 29, 1983, subpoena. Petitioner appeared before the grand jury on January 10, 1984, and again declined to produce the subpoenaed documents, invoking the attorney-client, work-product, and Fifth Amendment privileges. After a hearing, the district court denied petitioner's claims of privilege and held him in contempt.

The district court found that petitioner could not assert the attorney-client privilege with respect to the files of Sangre de Cristo because Sangre de Cristo had expressly waived the privilege following loss of its appeal (Pet. App. 28). Based on the "good faith statements by the prosecutor as to the testimony already received by the grand jury" (*id.* at 29), the court found the attorney-client privilege inapplicable to the files of Northern Community Preservation under the "crime or fraud" exception (*id.* at 28-29). On the

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[3]The court added that this analysis applies to the work-product privilege as well as to the attorney-client privilege (Pet. App. 25).

same basis, the court rejected petitioner's invocation of the work-product privilege (*id.* at 29). Finally, the court held that petitioner could not resist production of the subpoenaed documents under his personal privilege against self-incrimination. The court reasoned (*ibid.*) that the records "are not the personal records of [petitioner]" but records of "the institutional activity of the two organizations," and it concluded that, as such, they fall within the "required records" exception to the Fifth Amendment privilege.

4. The court of appeals affirmed (Pet. App. 1-13). First, the court concluded that because petitioner held the client files in a representative capacity for his clients, his invocation of the Fifth Amendment privilege must fail (Pet. App. 3-9). The court relied on *Bellis* v. *United States*, 417 U.S. 85 (1974), which held that an individual partner who maintained the partnership records in a representative capacity for the partnership could not assert the Fifth Amendment privilege with respect to those documents, even if they might incriminate him personally. The court of appeals reasoned that because "[a]ny ownership rights which inure in the [client] file belong to the client," client files are "indistinguishable in principle from the kinds of files which the Court found not subject to the Fifth Amendment privilege in *Bellis*" (Pet. App. 7).

The court also rejected petitioner's claim that the client files are protected by the work-product privilege on the ground that that privilege applies only to documents prepared in anticipation of litigation (Pet. App. 9-10). The court stated that "[a]lthough the trial court's findings [concerning whether petitioner prepared the files for litigation] were not explicit, they must stand inasmuch as [petitioner] has not demonstrated that the trial court's findings were clearly erroneous or that the trial court employed an erroneous legal standard" (*id.* at 10).

5. The panel thereafter granted petitioner's petition for rehearing and supplemented its opinion (Pet. App. 11-13). The court noted (*id.* at 12) that after the filing of the petition this Court had held in *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), that the production of personal papers may be a testimonial act protected by the Fifth Amendment. However, the court concluded that *Doe* did not affect its decision here, because *Doe* did not involve papers held by an individual in a representative capacity (Pet. App. 12-13).

In addition, the court rejected petitioner's argument that some of his other clients, who have not waived the attorney-client privilege, will be affected by the subpoena (Pet. App. 13). The court stated that the district court had "found that as to [petitioner's] other clients, the attorney-client privilege was not applicable under the furtherance of the crime or fraud exception" and that there was no reason to disturb that finding (*ibid.*). On the same basis, the court of appeals upheld the district court's determination that the work-product privilege is inapplicable (*ibid.*).[4]

ARGUMENT

1. Petitioner contends (Pet. 10-18) that he should not be required to comply with the subpoena for his client files because the act of producing the files would incriminate him. As noted, the court of appeals rejected petitioner's invocation of the Fifth Amendment on the ground that he holds the subpoenaed files in a representative capacity for his clients. The court analogized (Pet. App. 5-8) this case to *Bellis*, which held that the Fifth Amendment privilege could not properly be claimed by a partner served with a subpoena for documents that he held in a representative

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[4]The term of the grand jury that issued the subpoena has now expired. However, a new grand jury is continuing the investigation, and we are informed that an identical subpoena will be sought. This case is therefore not moot.

capacity for the partnership. Petitioner challenges the court of appeals' reliance on *Bellis* and argues that he does not hold the documents in a representative capacity in the same sense as in *Bellis*. This issue need not be addressed, however, because whether or not petitioner holds the files in a representative capacity for his clients, he clearly holds them on behalf of the professional corporation into which he has organized his practice.[5]

This Court has long held that the "books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian." *Curcio* v. *United States*, 354 U.S. 118, 122 (1957). See also, *e.g.*, *Bellis* v. *United States*, 417 U.S. at 88; *Essgee Co.* v. *United States*, 262 U.S. 151 (1923); *Wilson* v. *United States*, 221 U.S. 361 (1911). Most recently, in *Fisher* v. *United States*, 425 U.S. 391 (1976), this Court reaffirmed the rule "allow[ing] subpoenas against the custodian of corporate documents or those belonging to other collective entities * * * over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor" (*id.* at 411-412). Nothing in *United States* v. *Doe*, *supra*, is to the contrary. *Doe* recognized that the production of business records by a sole proprietor may be a testimonial act protected by the Fifth Amendment, but *Doe* did not involve a subpoena for corporate records served upon a corporate custodian, and the Court did not address that question.[6]

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[5]Petitioner concedes (Pet. 4) that his law practice is organized as a corporation. The fact that petitioner is a "sole practitioner" (Pet. 11) does not change the legal situation.

[6]The reasoning of *Doe* and *Fisher* does not undermine the rule that a subpoena for corporate documents may not be resisted on Fifth Amendment grounds. It is true that the rule was sometimes supported

Petitioner took the position in the court of appeals (Br. 13) that the rule depriving the custodian of corporate documents of Fifth Amendment protection does not apply to him because he is the only lawyer in the professional corporation. In his petition, he stresses that he is a "sole practitioner" (see Pet. 4, 11). However, "[i]t is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation" (*Bellis*, 417 U.S. at 100).[7] And in reiterating this rule in *Bellis*, this Court pointedly noted (*id.* at 100-101) that "increasing numbers of lawyers, doctors, and other professionals are choosing to conduct their business affairs in the corporate form." Thus the Court appears clearly to have contemplated that attorneys such as petitioner, who choose to

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in part by the principle, derived from *Boyd* v. *United States*, 116 U.S. 616 (1886), that the Fifth Amendment privilege protects private books and papers. See *Wilson* v. *United States*, 221 U.S. 361, 377 (1911). That interpretation of the Fifth Amendment has of course been repudiated in *Doe* (see slip op. 5-6) and *Fisher* (425 U.S. at 407-410). However, this Court has also cited other bases for the rule regarding corporate records. The Court has observed (*Bellis*, 417 U.S. at 90): "In view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege." The Court has also relied upon the importance of such records for law enforcement and "[t]he scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives." *United States* v. *White*, 322 U.S. 694, 700 (1944); see also *Wilson* v. *United States*, 221 U.S. 361, 384-385 (1911). Nothing in *Doe* casts the slightest doubt on the continuing validity of these bases for the rule regarding subpoenas for corporate records.

[7]See, *e.g.*, *Grant* v. *United States*, 227 U.S. 74 (1913) (sole stockholder of corporation not entitled to assert privilege with respect to corporate records); *Wild* v. *Brewer*, 329 F.2d 924 (9th Cir. 1964) (same); *United States* v. *Radetsky*, 535 F.2d 556, 568-569 (10th Cir. 1976) (doctor held not entitled to assert privilege with respect to records of professional corporation consisting of two doctors).

organize their practices as corporations, would hold the corporate records in a representative capacity.

Petitioner's reliance on *In re Grand Jury Subpoenas Duces Tecum*, 722 F.2d 981 (2d Cir. 1983), is unavailing. There the *former* president of a corporation invoked the Fifth Amendment to avoid producing corporate documents retained by him after leaving the corporation's employment. The court of appeals remanded the case for a determination whether the witness's act of producing the documents would be self-incriminating. The court concluded (*id.* at 986-987) that "[o]nce the officer leaves the company's employ, * * * he no longer acts as a corporate representative but functions in an individual capacity in his possession of corporate records."[8] The court expressly recognized (*id.* at 986) that an employee of a corporation is "normally * * * obligated as a representative of the company to produce its documents, regardless of whether they contained information incriminating him."

2. In rejecting petitioner's assertion of the attorney-client and work product privileges, the courts below relied on the "crime or fraud" exception.[9] Under that exception, neither a client's communication to his attorney nor the attorney's work product is privileged where the client consulted the attorney in furtherance of a crime. See, *e.g.*, *Clark* v. *United States*, 289 U.S. 1 (1933); *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. 1982) (en banc); *In re*

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[8]The court of appeals' reasoning appears inconsistent with *Bellis*, which held that a former partner of a dissolved law partnership could not invoke the Fifth Amendment privilege when served with a subpoena for the partnership's records.

[9]The court of appeals also rejected petitioner's invocation of the work-product privilege on the ground that the client files were not prepared in anticipation of litigation (see *Hickman* v. *Taylor*, 329 U.S. 495 (1947) — a fact petitioner does not dispute here. Nor does petitioner deny that one of his clients — Sangre de Cristo — expressly waived the attorney-client privilege (Pet. App. 3 n.2).

Doe, 662 F.2d 1073, 1079 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). Petitioner does not challenge the validity of the "crime or fraud" exception. Rather, petitioner contends (Pet. 18-21) that the courts below erred in holding that the applicability of the exception may be established by the prosecutor's "good faith" statements as to testimony already received by the grand jury. In addition, petitioner contends (Pet. 21-23) that the district court erred in failing to examine the client files in camera to determine whether each document related to the alleged crime or fraud.

To support his claim that the courts below erred in relying on the prosecutor's "good faith" recital of the testimony that had been presented to the grand jury, petitioner cites several cases in which the government presented affidavits, portions of transcript, or other evidence to establish the factual basis for the exception. However, as petitioner concedes (Pet. 19), no court of appeals has "expresssly rejected the procedure adopted here by the Tenth Circuit." While reliance on the prosecutor's statements may not be the best method for determining the applicability of the exception, it was permissible in this case, since the prosecutor's statements reflected actual testimony presented to the grand jury, and the district court expressly found that the prosecutor made the statements in "good faith" (Pet. App. 29). In any event, the validity of the unusual procedure employed here is not a question that warrants this Court's review.

Nor is there merit to petitioner's claim that the district court erroneously refused to conduct an in camera examination of the subpoenaed files to determine whether each document related to the alleged crime or fraud. The court of appeals expressly recognized in its first opinion that an in camera inspection would be appropriate where "there is a possibility that some of [the subpoenaed documents] may fall outside the scope of the exception to the privilege" (Pet. App. 25). However, "[a]fter reviewing the scope of the

subpoena issued and the * * * allegations concerning [petitioner's] involvement," the court concluded that "the scope of the exception to the attorney-client privilege in the case at bar would be sufficiently broad to cover all of the documents requested if the trial court determines that the government has made a prima facie showing [establishing the applicability of the 'crime of fraud' exception]" (*ibid.*). The district court made just such a finding on remand (*id.* at 28-29). No case cited by petitioner remotely suggests that an in camera inspection is always necessary, even where it is clear on the face of the record that all the subpoenaed documents fall within the exception. Nor does petitioner contend that any particular document contained in the subpoenaed files actually does not fall within the exception. In short, the court of appeals' fact-bound determination that an in camera inspection was unnecessary in this case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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